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Via Certified Mail & Regulations.gov

The Honorable Kathleen Sebelius
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: Comments from the States of West Virginia, Alabama, Georgia, Idaho, Kansas, Louisiana, Michigan, Nebraska, Oklahoma, Texas, and Virginia on legal and consumer privacy issues in HHS's proposed Affordable Care Act rule (CMS–9954–P)

Dear Secretary Sebelius,

As the chief legal officers of our States, we are concerned that the U.S. Department of Health and Human Services (HHS) has proposed a rule that both compounds illegal executive action and fails to protect the privacy of consumers using the health insurance exchanges. 78 Fed. Reg. 72,322 (Dec 2, 2013). *First*, the proposed rule includes changes intended to accommodate the President's recent "administrative fix" regarding cancelled health insurance plans. But the fix is flatly illegal under federal constitutional and statutory law. We support allowing citizens to keep their health insurance coverage, but the only way to fix this problem-ridden law is to enact changes lawfully: through congressional action. *Second*, HHS's regulations continue to ignore the widespread public outcry over the security of consumers' private information throughout the enrollment process on the healthcare exchanges. As attorneys general, we take the privacy of our states' consumers very seriously and are deeply concerned about the Administration's decision not to propose and implement rigorous privacy standards for

outreach personnel. HHS needs to implement common-sense safeguards, such as criminal background checks, for all persons with access to sensitive personal information.

I. The Proposed Rule Is Premised on Illegal Executive Action

A. Background

On November 14, 2013, in response to criticism over cancelled health insurance plans, President Obama announced that his Administration would allow insurance companies to continue offering cancelled plans that do not comply with the Affordable Care Act's mandates. *See* 78 Fed. Reg. at 72,324. The President acknowledged that "state insurance commissioners still have the power to decide what plans can and can't be sold in their states." But, he explained, "what we want to do is to be able to say to these folks, you know what, the Affordable Care Act is not going to be the reason why insurers have to cancel your plan."

In practical effect, the "fix" means that HHS will not be enforcing certain "market reforms" mandated by the Affordable Care Act. The Centers for Medicare & Medicaid Services (CMS) explained in a November 14 letter that under this "transitional policy," "health insurance coverage in the individual or small group market that is renewed for a policy year starting between January 1, 2014, and October 1, 2014, … will not be considered to be out of compliance with the market reforms specified below under [two] conditions." The letter identifies eight statutory "market reforms" that CMS is purporting to suspend. It also sets forth two conditions that must be satisfied for the alleged suspensions to apply: (1) that the coverage was in effect on October 1, 2013; and (2) that the health insurance issuer sends a notice with certain information, including notification of the specific market reforms that would not be available under the continued plan.

The proposed regulation seeks to change various rules governing health insurance in order to accommodate the "administrative fix." As the proposal states, "[t]o help address the effects of this transitional policy on the risk pool, we are exploring modifications to a number of programs." 78 Fed. Reg. at 72,324. Among other things, the proposal includes changes to the reinsurance and risk corridors programs. *Id.* at 72,345, 72,349 (referencing "recent policy changes" and "Adjustment Options for Transitional Policy"). But as we explain below, the fix is flatly illegal under federal constitutional and statutory law.

B. The Administrative Fix Is Unlawful

The President's "administrative fix" is unlawful for several reasons. *First*, it is a violation of the President's responsibility to "take care" to execute the laws faithfully. *Second*, it unlawfully creates either a new statutory obligation in violation of the separation of powers or a new rule in violation of the Administrative Procedure Act.

1. The Fix Is a Violation of the President's Responsibility to Faithfully Execute the Laws

CMS's attempt to temporarily suspend the operation of eight provisions of the Public Health Service Act violates the President's executive responsibility. The President (and the Executive Branch generally) is charged in several ways under the Constitution with the duty to faithfully execute the laws. Known as the "Take Care Clause," Article II, Section 3 of the Constitution explicitly provides that the President "shall take Care that the Laws be faithfully executed." Furthermore, the Constitution sets forth a specific manner by which the President may veto legislation with which he disagrees before it becomes law. *See* U.S. Const. art. I, § 7. Refusal or failure to faithfully enforce a duly enacted law thus would also amount to an extra-constitutional veto.

The President has argued that his administrative "fix" is a lawful exercise of enforcement discretion, but his actions go well beyond the discretion provided under the Supreme Court's precedents. The leading case is *Heckler v. Chaney*, 470 U.S. 821 (1985), an action brought by prison inmates to compel the Food and Drug Administration (FDA) to take enforcement action with respect to drugs used for lethal injections to carry out the death penalty. In response to specific requests, the FDA refused to take action, citing its "authori[ty] to decline to exercise [jurisdiction] under [its] inherent discretion to decline to pursue certain enforcement matters." *Id.* at 824. The Supreme Court agreed with the FDA, concluding that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831.

In *Heckler*, the Court held for a number of reasons that "an agency's decision not to take enforcement action should be presumed immune from judicial review." *Id.* at 832. One reason is that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831. For example, "the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* Another reason is that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Id.* at 832.

CMS's blanket suspension of enforcement exceeds the enforcement discretion contemplated in *Heckler*. The Court's reasoning in *Heckler* plainly contemplates case-by-case discretion—balancing "*this* violation" against "another." *Id.* at 831 (emphasis added). Its concern was that "[a]n agency generally cannot act against *each* technical violation of the statute it is charged with enforcing," *id.* (emphasis added), not that an agency might choose to entirely

suspend enforcement of a statute for a significant period of time. Indeed, *Heckler* itself concerned the FDA's response to one particular enforcement request.

As the Supreme Court stated long ago, "[t]o contend that the obligation imposed on the president to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and is entirely inadmissible." *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 525 (1838). The President's discretion "does not extend to prospective licensing of prohibited conduct, nor to policy-based non-enforcement of federal laws for entire categories of offenders." Zachary Price, *Enforcement Discretion and Executive Duty*, 67 Vanderbilt Law Review 4 (forthcoming April 14), available at http://ssrn.com/abstract=2359685 or http://dx.doi.org/10.2139/ssrn.2359685. The President cannot simply set aside statutes or rewrite them as he pleases. Doing so "collide[s] with another deeply rooted constitutional tradition: the principle that American Presidents, unlike English Kings, lack authority to suspend statutes or dispense with their application." *Id.*

2. The Fix Unlawfully Creates Either a New Statutory Obligation or a New Rule

In addition, CMS's imposition of a new disclosure requirement on insurers is either an unlawful new law or agency rule. That disclosure requirement appears nowhere in the United States Code. But the Constitution sets forth specific procedures for new laws. A statute must pass both houses of Congress and be signed by the President before it becomes law. *INS v. Chadha*, 462 U.S. 919, 958 (1983). Because the disclosure requirement did not go through these procedures, it cannot be enforced as a duly enacted statute.

To the extent CMS argues that the requirement is not a statute but a rule, it is unlawful at least for failure to comply with the Administrative Procedures Act (APA). For a rule to carry the force of law, it must be adopted pursuant to the notice-and-comment procedures in the APA. *See Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Those procedures were not followed with respect to the new requirement.

C. The Undersigned Support *Lawful* Action to Ensure Continued Coverage

More broadly, we are deeply concerned that this Administration is consistently rewriting new rules and effectively inventing statutory provisions to operationalize a flawed law. And the irony, of course, is that the changes being put forth to fix the disastrous exchanges will ultimately destroy the market and increase health insurance premiums for consumers who played by the rules.

The undersigned Attorneys General support allowing citizens to keep their health insurance coverage. However, the only way to fix this problem-ridden law is to enact changes lawfully: through congressional action. The illegal actions by this Administration must stop.

II. HHS Should Tighten Security Standards—Not Loosen Them—And It Should Impose Background Checks On All Consumer Assistance Programs

HHS's proposed rule is also inadequate in another way: it leaves the personal data of millions of consumers at great risk of misappropriation by poorly vetted consumer assistance personnel. These outreach personnel, including navigators, receive government funding to assist consumers in understanding their health insurance options and to facilitate enrollment in health insurance plans through the new exchanges. According to HHS's training manual, such individuals "may collect or come across" personally identifiable information during the enrollment process, including a consumer's name, date of birth, social security number, tax information, and protected health information "such as the individual's past, present, or future physical or mental health or condition." That information readily allows unscrupulous individuals to commit identify theft.

The Administration's current security standards are simply inadequate. On August 14, 2013, before the opening of the health insurance exchanges, thirteen Attorneys General wrote to you expressing grave concerns over your agency's failure "to adequately protect the privacy of those who will use the assistance programs connected with the new health insurance exchanges." The letter stated that HHS had not imposed meaningful security requirements on groups that input consumers' private data into insurance applications to help consumers enroll in health insurance plans.

Of particular note, HHS does not require uniform criminal background or fingerprint checks before hiring assistance personnel; indeed, HHS has never stated that *any* prior criminal acts are *per se* disqualifying. This lack of standardized background checks pales in comparison to what is usually required for employees in programs receiving federal healthcare funds, particularly with respect to high-risk employees with direct access to consumers. For example, CMS has worked with twenty-four states to design comprehensive national background check programs for employees in long-term care facilities with direct patient access. Likewise, in other rules promulgated by your agency, heightened screening, fingerprinting, and background check requirements apply to high-risk providers seeking to participate in Medicare, Medicaid, and the Children's Health Insurance Program. *See* 76 Fed. Reg. 5862.

Despite widespread public outcry over the disregard for consumer privacy shown by HHS and its rules governing assistance programs, HHS has never acknowledged these concerns. HHS never imposed additional security and training standards on the consumer assistance programs. Instead, HHS ignored the letter from thirteen Attorneys General, ignored media

concerns, and ignored follow-up FOIA requests. These concerns have since been borne out by numerous media reports about inadequately screened personnel violating laws and encouraging consumers to do the same.

Now, HHS is proposing to weaken these already-lax privacy standards. 78 Fed. Reg. 72,354-55. The proposed rule allows the Secretary to waive certain data privacy requirements that apply to exchanges. *Id.* And rather than propose any of the much-needed reforms to HHS's many data security and consumer privacy problems, HHS only seeks comment on "alternate ways to ensure protection for information." *Id.*

Nevertheless, we agree that belated action to protect consumers is better than no action. We propose the following basic, common-sense safeguards in response to HHS's request for assistance on "ways to ensure protection for information."

First, HHS should protect consumers by mandating rigorous background checks on all persons with access to private consumer information. HHS should immediately require uniform criminal background or fingerprint checks for all navigator and other assistance personnel, and state that certain prior criminal acts are *per se* disqualifying.

Second, personnel in navigator and other assistance programs should be subject to the same safeguards on consumers' private information as other federal employees who access sensitive consumer information. In particular, HHS should consider regulating these personnel like Census Bureau employees, who must take an oath for life to protect personal information gathered by the agency upon penalty of serious fines and imprisonment.

Third, HHS should mandate rigorous training requirements and accountability for all programs. We suggest that HHS look to state-licensed insurance agents and brokers as models. These individuals are regularly subject to licensing and educational requirements, as well as requirements for surety bonds and acts and omissions insurance. These requirements ensure personal accountability by personnel who misuse consumer information. HHS could also pattern improvements on the U.S. Treasury's ongoing reform of tax professionals, which includes registration of individual preparers, background checks, certification, competency examinations, and continuing education requirements. Such standards would ensure a basic minimum proficiency among personnel, as well as ensure that personnel are familiar with the best information available about consumers' health insurance options.

Fourth, HHS should explain what it intends to do to help defrauded consumers or consumers whose personal information is or was improperly shared. At a minimum, HHS should set forth who is liable for improper disclosure of private information. Existing laws criminally prohibit sharing certain forms of consumer information, such as tax returns, but those laws do not cover all the information consumers will provide to these HHS-sponsored programs.

Fifth, we ask HHS to consider working in partnership with state consumer protection efforts. In particular, we ask you to clarify that your agency's requirements do not bar States from imposing certification and licensing requirements, such as surety bonds and acts-and-omissions insurance, on non-profit assistance groups who are not licensed agents or brokers.

It is not enough simply to adopt vague policies against fraud. HHS has given its stamp of approval to every counselor who interacts with a consumer. This position of trust has allowed counselors to gain access to a wide variety of personal information from unsuspecting consumers. Unscrupulous counselors, who are not properly screened out or supervised, have easy means to commit identity theft on consumers seeking enrollment assistance. HHS needs on-the-ground plans to secure consumer information, to follow up on complaints, and to work with law enforcement officials to prosecute bad counselors.

We appreciate your prompt attention to these critical concerns.

Sincerely,

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Bill Schuette
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